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# UNITED STATES SUPREME COURT

October Term, 1919

No. 30

STANDARD FASHION COMPANY,
*Petitioner*,

v.

MAGRANE-HOUSTON COMPANY,
*Respondent*.

On Writ of Certiorari to the Circuit Court of Appeals
for the First Circuit.

## Brief in Reply to that of the United States as Amicus Curiae.

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# Supreme Court of the United States

OCTOBER TERM, 1921.

No. 20.

STANDARD FASHION COMPANY,
PETITIONER,

*v.*

MAGRANE-HOUSTON COMPANY,
RESPONDENT.

---

## BRIEF IN REPLY TO THAT OF THE UNITED STATES AS AMICUS CURIAE.

### Introduction.

The record of this case discloses a question of general public interest with respect to the construction of Section 3 of the Clayton Act (Solicitor General's Brief, p. 1), unless the contract in suit is construed as the plaintiff contends it should be construed, namely, as a contract of special agency or joint adventure. If plaintiff's contention is correct, this appeal does not require a construction of the Clayton Act.

The Solicitor General does not assume to discuss the particular facts of this case, but confines his brief to only some parts of the record which, as he conceives, bear upon the point in which he is interested, namely: the construction of the Clayton Act.

We think that by pursuing this method the Solicitor General has overlooked much of the record

and the inferences to be drawn therefrom as to the relationships between the parties under this contract; and while we do not intend to restate the facts here at length we will, under the points hereinafter stated, call attention to what we conceive to be those parts of the record which the Court should examine with particularity.

**Points to be Discussed.**

I. THE CASE IS NOT MOOT.

(a) The defendant still exists and will continue to exist for the purpose of suing and being sued and paying its debts and distributing its assets for three years after the Legislature authorizes its dissolution, which has not yet been done. (General Laws of Massachusetts, c. 155, Sec. 51).

(b) The defendant is entitled to such damages as it can prove and though the granting of an injunction now would be useless, the Court will retain the case to grant any appropriate relief (*County of Mobile* v. *Kimball*, 102 U. S., 706, 707, and other cases cited under this point).

(c) Before it can recover damages it must be decided whether the contract in question here is valid; and the decision is further required in the public interest because there are 6,000 of these contracts outstanding.

II. THE SOLICITOR GENERAL MISINTERPRETS THE DECISION OF THE COURT BELOW ON THE CONSTRUCTION OF THE CLAYTON ACT, in that

(a) That Court decided practically on the ground that within the four corners of the contract and without reference to the

evidence there had been provided means for lessening competition, irrespective of the use made of said means.

(b) The Court did not consider the undisputed evidence that there had been no lessening of competition or tendency to create a monopoly but on the contrary the system was keenly competitive, extremely advantageous to the public and in the opinion of a competent witness economical.

(c) There was no conflict in the testimony on any point, and the Court did not base its conclusion on findings of fact, or if it purported to do so it based inference on inference or presumption on presumption, which is not permissible.

III. THE CONTRACT IS NOT ONE OF SALE.

(a) But a method adopted by plaintiff without combination with any one as a reasonable one to market its goods.

(b) The provisions of the contract are reasonably adapted to this purpose, requiring the defendant at all times to conserve the best interests of the agency, to protect plaintiff's goods, to sell them only at retail and to return in bulk all that are not so sold so that out-of-date patterns will not get on the market and plaintiff's retained business as well as its reputation will not be injured.

(c) The fact that defendant was required at all times to keep a minimum amount of stock and at the end of the contract to return this minimum amount and that by reason of the exchange privilege it could not be determined until the end of the contract and the return of the unsold patterns what the plaintiff would receive for its patterns or what the defendant would pay shows that it could not have been in-

tended to sell the patterns to defendant. An unqualified title never vested in the defendant.

(d) It was intended to secure the exclusive services of defendant in selling plaintiff's patterns and to allow the sale of other makes on the same premises would interfere with defendant's giving such exclusive service; and it was not intended to injure competitors or the public and as a fact it did not as appears from the record.

IV. THE NEGATIVE COVENANT IS NOT SUCH A CONDITION AS IS PROHIBITED BY SECTION 3.

(a) Because it is specifically limited to the premises described in the contract on which defendant was to sell plaintiff's patterns, and notwithstanding it defendant if it desired could sell other makes of patterns in any other store or stores it had or might have in the same or any other city.

(b) Because the actual facts show that notwithstanding it the competition has been exceedingly keen and plaintiff's competitors have in the majority of cases come into existence during the use of such covenant by plaintiff and some of such competitors have secured a greater number of the 52,000 pattern agencies than plaintiff, one of them about twice as many.

## ARGUMENT.

### I.

### The case is not moot.

Even if the information of the Solicitor General (Brief, p. 8) is correct, the defendant has never been dissolved. Its last certificate of condition was filed under the laws of Massachusetts in 1919. There is on file in the State House a letter dated December 31, 1920, stating that the company had wound up its affairs and ceased doing business March 27, 1920, and asking to be dissolved. No further steps have been taken towards dissolution.

> "Every corporation whose charter expires by its own limitation or is annulled by forfeiture or otherwise, or whose corporate existence for other purposes is terminated in any other manner, shall nevertheless be continued as a body corporate for three years after the time when it would have been so dissolved for the purpose of prosecuting and defending suits by or against it and enabling it gradually to settle and close its affairs, to dispose of and convey its property and to divide its capital stock, but not for the purpose of continuing the business for which it was established; provided, that the corporate existence of such a corporation, for the purposes of any suit brought by or against it within said period of three years, shall continue beyond said period for a further period of sixty days after final judgment in the suit." (General Laws of Massachusetts, C. 155, Sec. 151.)

We are advised that the defendant has ceased to do business as a retail drygoods house, and that it is in that sense that its affairs have been wound up. Certainly its obligations to the plaintiff have not been liquidated.

Upon the trial the defendant proved $3,798.46 damages (pp. 49, 50, 52, 53), from which would be deducted $788.73 as a credit for the unsold stock returned (p. 54).

The foregoing damages were proved as the loss resulting from the termination of the agency by the breach by the defendant of that part of its contract obligating it to continue to sell plaintiff's patterns in its store.

The quotations in the Solicitor General's brief taken from the brief of the appellant upon rehearing relate to three other kinds of damage, to wit:

> "The loss of sales outside the defendant's store which would have been induced by the distribution of plaintiff's advertising material by the defendant.
>
> "The loss of sales by the diversion of business in the defendant's store to the McCall Company.
>
> "The loss of sales by the diversion of business to the McCall Company outside the defendant's store by the distribution of *its* advertising material" (*p. 4, Appellant's Brief upon Rehearing.*)

It was of these three additional kinds of damages that the language was used which the Solicitor General quotes from page 16 of the brief for the appellant upon rehearing in the Circuit Court of Appeals (See also pp. 4 and 5, of same brief).

The quotation made by the Solicitor General from page 2 of the same brief discloses, we submit, another way of saying that there is a matter of public interest involved as well as plaintiff's particular interest in having the contract in question passed on.

If plaintiff's contract is lawful it will have a right to recover from the defendant not only the

damages shown at the trial but the classes of damages above mentioned, if they can be ascertained, and/or under the circumstances of this case we believe plaintiff can recover the profits realized by the defendant from the sale by it of the McCall patterns. These profits can now be ascertained.

With respect to *all* of these kinds of damages the plaintiff's rights are dependent upon the validity of the contract. If the arrangement entered into is unlawful the plaintiff is remediless in any Court.

It is plain that the plaintiff can make no headway at all on the question of damages until the question of the legality of the arrangement between the plaintiff and the defendant has been established. We submit nothing is clearer than that whenever relief by way of injunction becomes inappropriate because of lapse of time or by some other similar adventitious circumstances the Federal Courts will retain jurisdiction in equity for the purpose of granting any appropriate relief, though it be only the assessment of damages.

> *Beedle* v. *Bennett*, 122 U. S., 71;
> *County of Mobile* v. *Kimball*, 102 U. S., 691, 706, 707;
> *Chinnook* v. *Paterson, etc., Co.*, 112 F., 531;
> *Rose* v. *City of Fort Wayne*, 63 F., 466;
> *Van Allen* v. *N. Y. E. R. R. Co.*, 144 N. Y., 174, 179, 180.

Moreover, there are additional and important reasons which seem to the plaintiff to require a decision herein in the interest of justice.

The District Court decided this contract was unlawful within Section 3 of the Clayton Act. That

opinion is now on record unreversed, and under its terms not only this particular contract but all the thousands of similar contracts in this country are invalidated, as the District Judge did not deal with the facts of this particular case but held that the contract was upon its face monopolistic in tendency because of what might be done under contracts of this nature and thus was void under the Clayton Act (p. 16).

The Circuit Court of Appeals, we submit, made the same decision. If that decision is wrong it is most unjust that it should stand unreversed. If it is right, this Court should so determine.

Both parties to this suit are alive. The controversy between them is alive and undecided. There is no abstract question involved as between these parties. The question involved is upon existing facts and rights. We are not asking a decision in advance about a right before it has been actually asserted and contested, nor a decision upon a mere abstract question, nor a judgment which can have no practical legal effect. We are asking for a decision which is essential to guide the District Judge in the further progress of this litigation; and the fact that the question is of great public interest (Solicitor General's Brief, p. 1), is a further consideration of importance and brings the case within the principle laid down by this Court in numerous cases.

*Ex Parte Steele*, 162 F., 694, 701;

*Boise City Irr. & Land Co.* v. *Clarke*, 131 F., 415, 419;

*Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S., 498, 515, 516;

*U. S.* v. *Trans-Missouri Freight Assn.*, 166 U. S., 290, 308, 309;
*Adams* v. *Union R. R. Co.*, 21 R. I., 134;
*U. S.* v. *Pan-American Commission*, 261 F., 229;
27 Cyc., p. 911, n., 10;
Suppl. 1901, p. 3050;
Suppl. 1914-1918, p. 2382.

We are advised that there are numerous proceedings which have been started by the Federal Trade Commission which involve this very question, and among others this very contract. Furthermore, we understand the rule to be that no equity case is moot in which a decree consistent with the pleadings and existing facts can be entered which will determine the rights of the parties to the litigation.

We submit that as a matter of substance as well as of technicality the case is not a moot case.

## II.

**The interpretation of the decision of the Court below upon the construction of the Clayton Act which the Solicitor General insists on is, we think, erroneous.**

We think that the Court below meant what it said in stating (p. 156):

> "In order to condemn the negative covenant it is not necessary that the Court should find that it will lessen competition or will tend to create a monopoly; it is enough to find that it *may* lessen competition or *may* tend to create a monopoly." (Italics are ours.)

The District Court laid down the rule (p. 16), saying:

> "I do not think it is the duty of the Court to find this (a substantial lessening of competition), before we can pronounce a contract unlawful, etc. * * * We think, therefore, it is the duty of the Court to determine whether or not the contract has provided means for a real or substantial lessening of competition, irrespective of what use has been or is being made of these means."

That our understanding of the decision of the Circuit Court of Appeals is correct becomes evident from the dissenting opinion of Judge Brown (p. 159):

> "In applying the statute it must be judicially determined what the effect may be. This judgment must be more than a mere feeling of possibility arising in ignorance of facts which if known would destroy that feeling. It must be based on knowledge and upon a reasonable belief that in view of existing facts there is a 'dangerous probability.'"

And again (p. 161):

> "I am of the opinion that on the present record we can not properly determine that the contract is invalid under the Clayton Act. The statute does not create a presumption that such contracts are inherently vicious, nor does it impose upon the plaintiff the burden of proving that the contracts are not illegal. The presumption is of legality, and the burden is upon him who asserts the illegality. The application of the statute should be made only upon full proofs."

Judge Brown having said elsewhere (p. 160) that "the invalidity of this contract" should not be determined by the Court "upon so incomplete a state

of proofs"—meaning what he had said in the preceding paragraph, "that Congress had rejected various drafts which would make a contract of this character void upon its face"—and had inserted the final clause "to prevent the disturbance that might result to long-established methods of business by an indiscriminate condemnation of a large body of existing contracts because of the verbal form, irrespective of this actual or probable effect, etc."

It is true the Court said (p. 156):

> "We must consider this restriction in the light of the facts peculiar to the business to which the restraint is applied, to the conditions already achieved under such restraint as well as the nature of restraint and its effect actual or probable. Viewing it thus in the light of the surrounding circumstances we are constrained to agree with the District Court that the negative covenant in this contract *may* lessen competition or *may* tend to create a monopoly—or both—and is therefore obnoxious to the Clayton Act." (Italics are ours.)

The Court had been saying (p. 156):

> "It already appears that out of some 52,000 pattern agencies in this country the plaintiff or a holding company controlling it and two other pattern companies control approximately two-fifths. The restriction of each merchant to one pattern manufacturer must in hundreds, perhaps in thousands, of small communities amount to giving such pattern manufacturer a monopoly of business in such community. Even in the larger cities, to limit to a single pattern maker the pattern business of dealers most resorted to by customers whose purchases tend to give fashions their vogue, may tend to facilitate further combina-

> tions; so that the plaintiff, or some other aggressive concern, instead of controlling two-fifths, will shortly have almost, if not quite, all the pattern business."

It is in respect of this statement that the Court made the construction of the Clayton Act just above mentioned.

The District Court made no finding of fact, and except for the quotation just referred to the Circuit Court of Appeals made no statement of facts.

Yet none of the testimony offered by the plaintiff was contradicted, and that testimony disclosed that there had been no lessening of competition but that competition had increased and was increasing all the time, that new companies had come into existence and thriven, that the McCall Company which induced the defendant here to break its contract with the plaintiff had come into existence since the plaintiff began business and adopted this form of contract, and that it had secured twice as many agencies as the plaintiff in the many years of its existence had been able to acquire. The testimony further showed that the business under the system of contracts here in question was keenly competitive, extremely advantageous to the public and in the opinion of the witness economical.

There was no testimony showing that any deception, misrepresentation or oppression had been practised; there was no complaint of any competitor or any person at all of any unfairness or unfair methods, nor any suggestion that the public had suffered injury or that competitors had reasonable ground for complaint.

*We submit that upon such a record the Court erred in reaching its conclusion upon the narrow grounds stated in its opinion, which we think we are entirely justified in saying ignored the undisputed testimony just referred to.*

A tendency is an inference from proven facts, an inference from the facts is a question of law for the Court. The testimony was undisputed and the case occupies when it comes here under such circumstances the same position it would occupy had the facts been agreed upon by the parties and their agreement embodied in the record. (*United States* v. *Pugh*, 99 U. S., 265, 271.)

We submit that it is error in construing Section 3 of the Clayton Act to so construe the words "may be" as will result in imaginings in respect to possible lessenings of competition or tendencies to create monopolies, when it would seem to be plain that Congress meant to deal with the discernment and suppression of practices in the course of commerce which in connection with an accomplished sale or lease was bringing about a condition adverse to the public policy of Congress to prevent restraints of trade and establishment of monopolies whether accomplished or in their earlier stages.

The District Court decided this question upon the ground that within the four corners of the contract and without reference to the evidence there had been "provided means for a real or substantial lessening of competition, irrespective of what use has been or is being made of these means" (p. 16); and this interpretation of Section 3 of the Clayton Act was affirmed by the Circuit Court of Appeals notwithstanding its reference to

the rule requiring consideration of the surrounding circumstances, etc.

We submit that the section did not contemplate such an interpretation because of the proviso appearing at the end thereof, particularly under circumstances such as exist in this case where the facts are in the record. For under such circumstances the Court must consider *all* the facts peculiar to the business to which the restraint is applied, its condition before and *after* the restraint was imposed, the nature of the restraint and its effect actual or probable, the history of the restraint, the evil believed to exist, the reason for the adoption of a particular remedy, and the purpose or end sought to be obtained, because they are all relevant facts. Where a record discloses the facts, a conclusion of the actual effect or tendency can be found, and from that, probabilities considered.

And we earnestly urge this construction of the Act, at the same time suggesting that this view must necessarily be correct since Section 3 of the Clayton Act would naturally be interpreted as contended for by the District Court if the proviso at the end were omitted; and by the introduction of that proviso Congress meant to deal with facts as they are and to afford an opportunity to ascertain the conditions before and after the restraint complained of.

In other words, the interpretation contended for by the Solicitor General would have been proper if the final proviso had not been inserted in the Act at all. By inserting this proviso Congress must be deemed not to have had the intent attributed to it by the Solicitor General.

We think as a rule of interpretation the lan-

guage used by this Court in *United States* v. *United States Steel Corporation*, 251 U. S., at page 444, may appropriately be called to the Court's attention at this point:

> "Our consideration should be of not what the corporation had power to do or did, but what it has power to do and is doing."

Moreover, the Solicitor General overlooks the testimony (p. 38), that the plaintiff in its sales rooms sells quite largely directly to the public without imposing any condition whatsoever on the purchasers and at the ordinary retail or label prices and in addition thereto does a very considerable mail order business. It thus appears that this contract is further distinguished from the interpretation suggested by the Solicitor General as to the Clayton Act, through this very considerable portion of the plaintiff's business conducted through its own stores and by mail.

For it is submitted that the Clayton Act is not intended to change the law in any way with respect to the rights of a manufacturer to so market his goods as will prevent the buyer of the product from using the same in competition with the business retained by the seller, of selling direct to the public where it appears, as the uncontradicted evidence here shows, that without such restriction the business of the manufacturer would suffer injury (pp. 36, 37, 38).

In *U. S.* v. *Addyston Pipe Co.*, 85 F., 271, a partial restraint of trade was said to be permissible where the provisions are reasonably necessary to prevent competition by the buyer with the business retained by the seller.

This decision was modified by this court (175

U. S., 211), but the modification had no reference to the foregoing proposition.

This proposition is cited approvingly in the *John D. Park & Sons Co.* case (153 F., 24, 42, App. dis., 212, U. S., 588), and the followning cited as typical cases:

> *American Strawboard Co.* v. *Adlemann Paper Co.*, 83 F., 619;
> *Hitchcock* v. *Anthony*, 83 F., 779;
> *Navigation Co.* v. *Winsor*, 20 Wall., 64;
> *Dunlop* v. *Gregory*, 10 N. Y., 241;
> *Hodge* v. *Sloan*, 107 N. Y., 244.

It is contended by the Solicitor General (Brief, p. 6), that the Court below based its conclusions upon findings of fact. The respect in which the Solicitor General thinks the Court founded its decision on findings of fact is that the one surrounding circumstance referred to in the opinion of the Court below, to wit: the common ownership of the stock of the plaintiff and two other companies, was the *effect* of the plaintiff's contract. There was no evidence whatever showing that this surrounding circumstance was the effect of the plaintiff's contract or contracts.

If it be assumed that the Court so found then the finding is without any evidence to support it. If, therefore, the Solicitor General is correct in the assumption that the Court found as a matter of fact based on this inference that the effect of the plaintiff's contracts may be to substantially lessen competition or tend to create a monopoly, such finding was based upon an inference based upon a prior inference. This, we submit, is an error of law. The effect of the plaintiff's contracts could have been no different if the plaintiff were the

owner of all of the stock of the three companies mentioned, nor could the effect be any different if some competitor controlled all of the 46,000 contracts other than those of the plaintiff.

We repeat, the District Court ruled that if the contract provided "means" it was immaterial whether the "means" had been or were being used, and the Court of Appeals agrees, saying, "It is enough to find that it *may* lessen competition or *may* tend to create a monopoly" (p. 156). We say that this is not enough, but that it must be shown that there is a real and substantial probability that the effect will be to substantially lessen competition or tend to create a monopoly, and not a mere possibility that these results may follow (p. 159).

We therefore respectfully submit that the Solicitor General is in error in his contention that the Court based its conclusion upon findings of fact, and that the opinion, properly understood declares the contract to be void on its face.

The statement (Solicitor General's brief p. 20) quoting the Circuit Court of Appeals, exhibits the contention that a contract which may put it in the power of the seller to lessen competition is prohibited by the Clayton Act. So far as this is based on Judge Trieber's decision (234 F., 127, 150), we may say that he has changed his views (264 F., 138, 167); for he there held certain restrictive clauses lawful because reasonable in the light of the evidence before him showing how they worked out.

We believe that with what was said in our principal brief sufficient has been said here to advise the Court of the situation in this case without taking up any further particular questions covered by the Solicitor General under this point.

## III.

### The contract is not one of sale.

We submit that the contract is a method for the plaintiff to market its own goods, the principal part of which it markets through contracts similar to the one here, and the balance of which it markets through its own salesrooms and through the mail (pp. 36, 38). Thus viewed, the reasons for the provisions of the contract appear to be clarified and to make unnatural the construction suggested by the Solicitor General that the defendant could give away the patterns (Brief, p. 21). The scheme of the contract requires the agent in conserving at all times the best interests of the agency to protect the plaintiffs' goods, sell them only at retail, and to return in bulk all that are not so sold, so that out-of-date patterns may not get on the market, and the plaintiff's own retained business as well as its reputation may not be injured.

While we have attempted to make clear in our principal brief that the object of establishing the agency is to sell patterns *through* the local dealer to the public, and not *to* the local dealer, it may be profitable to slightly expand what we there said by particular references to the record, in view of the suggestion of the Solicitor General that "plaintiff somewhat overstates the effect of the provisions upon which it relies" (Brief, p. 21).

The pattern business has many peculiar features, different from practically every other business. When an agency is to be established a dry-goods store is sought where piece goods and fabrics of that kind are sold; these make the most de-

sirable agencies where the customers may buy the goods for the garments that are made with the aid of Standard patterns (p. 26). An assortment of patterns consists of about 1,200 different styles (pp. 27, 38), cut at an average of about seven sizes for each style (p. 27). The amount of the stock to be placed in the agency is determined with the closest possible reference to the business of the particular agency (p. 27). The stock agreed upon between the parties in this case (p. 68) meant about 14,285 patterns. A new assortment of about 60 new styles per month was issued (p. 27). Patterns are very perishable (p. 27). Styles change very quickly (p. 27). Patterns which go out of style must be exchanged for patterns of up-to-date styles (p. 27). One cannot sell any which are out of date (p. 86). When patterns go out of style, they become worthless except as waste paper (p. 28). In order to properly conduct the business it is necessary for the agent to keep on hand a proper assortment of patterns. This means that the agent (in this case the defendant) must maintain a stock of patterns of a minimum amount.

From the very nature of the business, it is never expected that the agent shall sell to the public, (and from the terms of this contract it is plain that it was never intended that the defendant should sell to the public) all of the patterns, since he must return at the end of the agency the minimum amount of the stock of patterns which he has been obligated to maintain.

Upon the termination of the contract (p. 131) the defendant returned the entire stock for credit at 75%.

In view of these provisions it is clear that there

always must remain with the defendant the minimum amount (in this case $1,000 in value, p. 130, 131), which it was not intended should be sold either by the plaintiff to the defendant or by the defendant to the public.

The amount that the plaintiff receives and the amount that the defendant pays is ultimately determined by the proportion of the patterns returned during the period of the contract and the charges each makes in his account in respect thereto.

In other words, the exchange privilege makes it impracticable to ascertain the percentage of profit in the transaction until the contract period has been finished (pp. 64, 65).

To illustrate:—From every dollar received for patterns sold at retail, the defendant receives 50c. gross, and the plaintiff receives 50c. gross. On every dollar's worth at retail of patterns not sold but returned by the defendant during the period of the contract in exchange for new patterns the defendant contributed one-tenth of the net price, or 5c. on the dollar at retail, and on all such patterns not sold but returned, the risk of the defendant is limited to 5 per cent. of the retail price, while the balance of the risk and loss is assumed by the plaintiff.

The ultimate cost of the patterns to the defendant and the amount received by the plaintiff is not *fixed* by the discount of 50% provided in the contract. As explained by Mr. Scanlon, although the profit of the plaintiff on a 15c. pattern (charged to the defendant at 7½ cents), if sold by the defendant, would be fixed at 5½ cents per pattern (pp. 62, 64, 84), nevertheless the actual profit would be reduced by reason of the exchanges (pp.

62, 65, 84). Thus on the patterns furnished to the defendant (while it performed the contract) amounting in value to $6,109.80 net (p. 49), the plaintiff's profit was only $2,612 (p. 69) because $1,578.83 in value of these patterns were furnished in exchange (p. 49).

The reason of this may be well illustrated by taking as an example a 20c. pattern. A 20c. pattern furnished to the defendant was charged at 10c. If such pattern was not sold but returned for exchange, the defendant would be credited with 9/10ths of the price with which it was originally charged, 9c., and the agent's loss would be 1c. In such event a new pattern would be furnished to the agent, for the credit of 9c. and for the additional charge of 1c. In that way the agent would have one 20c. pattern at 11c., and the plaintiff would have furnished two 20c. patterns, for which it had charged the defendant 11c. If the same pattern was returned the second time the agent would again receive a credit of 9c. and would get a new pattern for which it would be charged 10c. As a result of this transaction the agent would have one 20c. pattern charged at 12c., and the plaintiff would have furnished three 20c. patterns for which it would have charged the defendant 12c. and so on as long as the pattern or replacing pattern might be returned. It thus appears that the cost of the patterns which are sold by the defendant and the amount received by the plaintiff for such patterns sold depends altogether upon the proportion of the patterns furnished by the plaintiff to the defendant, which the defendant sells to the public.

In such circumstances the provision of the contract by which the discount of 10% for patterns exchanged is required, and the provision that the

defendant shall give proper attention to the sale of the patterns and to conserve the best interests of the agency at all times, operate to the advantage of the defendant as well as the plaintiff. Even the discount itself tends to make it to the pecuniary interest of the defendant to endeavor to sell patterns rather than to return them. This is evidenced by the fact that if it does sell them (without exchange), it gets 50c. on the dollar at retail whereas if it does not sell them, it sustains a loss of 5c. on the dollar at retail on each return. The same clause operates to the benefit of the plaintiff, for if the agent sells the pattern instead of returning it, the cost to the plaintiff of furnishing the patterns, which are sold, is thus reduced. It is thus clear that the more patterns which are sold by the defendant to the public the less it costs the defendant, and the less it costs the plaintiff to furnish the patterns.

With a clear understanding of the operation of these provisions of the contract, the other provision that the agent shall not sell or permit to be sold on the premises any other make of patterns during the term of the contract is in furtherance of the sale of the patterns which form the subject matter of the joint adventure, and is a most reasonable one. It must of course, be obvious that if some other make of pattern were offered in the same store, the tendency would be to reduce the sale of plaintiff's patterns and thus increase the number of patterns which the defendant must return to the plaintiff either in exchange during the term of the contract or for credit at 75 per cent at the close of the contract, and thus to increase the cost to each of the parties of carrying out the joint adventure.

Such a transaction cannot be called a sale.

## IV.

**The contract is not on the condition forbidden by the statute.**

The Solicitor General contends that the restriction upon the defendant not to sell or permit to be sold on its premises during the term of the contract any other make of patterns means something other than a restriction upon the defendant at the particular place.

The testimony shows where the premises of the defendant were, and, furthermore, the contract specifies (p. 131) where they were.

We think the language of the contract settles this question. Perhaps it may be appropriate, however, to mention the fact, of which the Court is doubtless by general information informed, that many corporations exist having stores in many cities, and many having more than one store in the same city. The fact is that such corporate merchants very frequently market one make of patterns in one store and another make in another store where they have more than one store in the same city; and, similarly, where they have stores in different cities, market one make of patterns in one city and another make or makes of patterns in other cities. This practice is in exact accordance with our understanding of the meaning of the provision of the contract referred to.

The actual facts show that notwithstanding this covenant the competition has been exceedingly keen and plaintiff's competitors have in the majority of cases come into existence during the use of such covenant by plaintiff and some of such competitors have secured a greater number of the

52,000 pattern agencies than plaintiff, one of them about twice as many.

## V.

**Other cases in which Section 3 has been considered.**

Since the former argument in January, 1921, the following cases have been decided, each involving the interpretation and application of Section 3:

*Curtis Publishing Co.* v. *Federal Trade Com'n*, 270 F., 881;
*The Texas Company* v. *Federal Trade Com'n*, 273 F., 478;
*The Standard Oil Co.* v. *Federal Trade Com'n*, 273 F., 478;
*The Canfield Oil Co.* v. *Federal Trade Com'n*, and five other cases, 274 F., 571;
*Sinclair Refining Co.* v. *Federal Trade Com'n*, not yet reported.

They are now pending before this Court. We therefore deem comment on them unnecessary.

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